United States Court of Appeals for the Second Circuit



APPENDIX

75-2073

To be argued by: JOEL A. BRENNER Time: 20 Minutes

75C 167

NEW YORK SUPREME COURT

APPELLATE DIVISION-SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STEWART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Defendants-Appellants.

APPELLANTS' SUPPLEMENTAL BRIEF
AND APPENDIX

DILLER & SCHMUKLER
Attorneys for DefendantsAppellants.
299 Broadway - Suite 615
New York, New York 10007
(212) 349 5554

JOEL A. BRENNER 1501 Franklin Avenue Mineola, New York 11501 (516) 294 9490 Of Counsel

Queens County Clerk's Index No.: 2115/71 and 2116/71

To be argued by: JOEL A. BRENNER Time: 20 minutes

NEW YORK SUPREME COURT

APPELLATE DIVISION--SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STEWART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Defendants'Appellants.

APPELLANTS' SUPPLEMENTAL BRIEF AND APPENDIX

DILLER & SCHMUKLER
Attorney for DefendantsAppellants
299 Broadway
New York, N. Y. 10007
349-5554

create York .

JOEL A. BRENNER 1501 Franklin Avenue Mineola, N. Y. 11501 (516) 294-9490 of counsel

TABLE OF CONTENTS OF BRIEF

								*			Page
Statement Pursu	uant to CPLR 5531										1
Questions Prese	ented										2a
Preliminary Sta	atement		•	•	•	•	•				3
Statement of Fa	acts										3
Argument:						•				•	12
Point I - APPELLANTS SUSTAINED THEIR BURDEN OF PROVING BY A PRE- PONDERANCE OF THE EVIDENCE THAT OFFICER BONING COMMIT- TED PERJURY.										12	
Point II -	I - APPELLANTS PRESERVE FOR FUR- THER APPELLATE REVIEW THEIR CONTENTIONS THAT THE AFFIDA- VIT DID NOT SET FORTH PROBABLE CAUSE.									17	
Conclusion											18

TABLE OF CASES CITED

	Page
DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)	13
Gardner v. Broderick, 393 U.S. 273 (1968)	16
Matter of Second Grand Jury v. Cirillo, 12 N.Y.2d 206 (1963)	1.5
People v. Alfinito, 16 N.Y.2d 181 (1965)	12
People v. Asaio, 34 A.D. 2d 968 (2d Dept., 1970)	16
People v. Baldwin, 25 N.Y.2d 66 (1969)	12
People v. Boniface, 37 A.D.2d 728 (2d Dept. 1971)	16
People v. Boyd, 57 Misc. 2d 49 (Dist. Ct.Nass.Co	12
People v. Cameron, 40 A.D.2d 1034 (2d Dept. 1972)	3
People v. Cardaio, 18 N.Y.2d 924 (1966)	13
People v. Connolly, 253 N.Y. 330 (1930)	13
People v. Griffith, 25 A.D.2d 756 (2d Dept. 1966)	16
People v. Harrington, 70 Misc. 2d 303 (Alleghany Co. Ct., 1972)	14
People v. Malinsky, 15 N.Y.2d 86 (1965)	15
People v. Irizarry, 64 Misc.2d 49 (Cr.Ct.N.Y.Co. 1970)	12
People v. Persico, 24 N.Y.2d 758	1, 15
People v. Rahming, 26 N.Y.2d 411 (1970)	12

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK:

Respondent,:

-against
EDITH MAY CAMERON
STANLEY TAYLOR SIMS
KENNETH DAVIS
ROBERT STEWART WILLIAMS
MARVIN CAMERON
JENNIE SIMS,

Defendants-Appellants.

STATEMENT PURSUANT TO CPLR 5531

- The indictment numbers in the court below were 2115/71, 2116/71.
- 2. The full names of the original parties were the People of the State of New York against Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron and Jennie Sims. There has been no change of parties on this appeal.
- 3. This action was commenced in Supreme Court, Queens County.
- 4. This action was commenced by the filing of an indictment.

rephore in the court had

- This appeal is from an order denying appellants' motion to controvert a search warrant rendered August 14, 1973.
- 6. This appeal is being prosecuted by the Appendix method.

QUESTIONS PRESENTED

- 1. WHETHER APPELLANTS SUSTAINED THEIR BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT OFFICER BONINO COMMITTED PERJURY.
- WHETHER THE AFFIDAVIT OF OFFICER BONING SET FORTH PROBABLE CAUSE.

OF THE PROPERTY

THE PROPERTY OF THE EVIDENT PERSONS OF THE EVIDENT PERSONS OF THE EVIDENT PERSONS OF THE EVIDENT PERSONS OF THE PERSONS OF THE

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against
EDITH MAY CAMERON
STANLEY TAYLOR SIMS
KENNETH DAVIS
ROBERT STEWART WILLIAMS
MARVIN CAMERON
JENNIE SIMS,

Defendants-Appellants.

PRELIMINARY STATEMENT

This is an appeal from an order entered August 14, 1973 in the Supreme Court, Queens County (Brennan, J.) denying appellants' motion to controvert a search warrant. The order was entered following a hearing which had been directed by this Court in its decision on the judgment appeal (People v. Cameron et al, 40 A.D. 2d 1034 [2d Dept. 1972]. This Court retained jurisdiction of the appeal.

STATEMENT OF FACTS

PRIOR PROCEEDINGS

On May 15, 1972 appellants were convicted, on their pleas of guilty, of possession of a dangerous drug and were sentenced. On appeal to this Court appellants argued that the denial of their motion to suppress was error and that they had been improperly denied a hearing on their motion

to controvert a search warrant on the ground that the affidavit contained perjury.

On December 29, 1972 this Court rendered a decision affirming the denial of the motion to suppress but remanding the case to the Supreme Court for a hearing on the issue of whether the search warrant affidavit contained perjury (People v. Cameron, et al, 40 A.D. 2d 1035 (2d Dept. 1972))

HEARING(6/5 - 6/7/73)

Patrolman Lucido Bonino testified that he was an expert on policy (4-5).*/

On May 18, 1971 he and a brother officer were investigating appellant Stanley Sims (He was unable to produce his memo book for that date [6-9]). After reading the search warrant, his recollection was refreshed and he was able to testify that he arrived in the vicinity of Sims' residence at about 11:00 a.m.; he could not remember where his car was parked (9-12).

Sims left his residence, entered a car, and drove to the appellants' Camerons residence (13).

At this point defense counsel was directed to lay a foundation connecting testimony as to these events with his allegations that a Knapp Commission witness had said the officer had committed perjury with regard to this case. The witness admitted being subpoenaed before a Queens grand jury in regard to this case and he then took the Fifth Amendment when asked if he had been similarly subpoenaed by a Federal grand jury. After a recess the hearing was adjourned to permit the officer to appear with counsel (15-22).

reseased in the within

a.r.; he coll

^{*/}Numerical references are to the minutes of the suppression hearing, which are set forth in full in the Appendix.

The officer subsequently appeared with counsel (27)

(Ne was cautioned to confer only with counsel when responding to questions and not to look to the prosecutors for any comment, as defense counsel said he had done the previous day [30]).

He said he was subpoensed by a Federal grand jury but "I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges" (31).

The officer testified that when Sims was arrested a large amount of drugs and currency was seized at his residence (32-33). He invoked the Fifth Amendment and refused to answer questions as to whether any seized drugs, currency or jewelry was not turned over to the Police Property Clerk (34-37). He refused to answer similar questions with regard to unreported seizures of drugs, currency or jewelry from the Cameron residence (38, 40-41). **/ Furthermore, he refused to answer whether he had seized and kept any drugs not noted on the inventory made on the return of the warrant (39-40).

When asked if he had been questioned in the Federal grand jury about the truthfulness of the affidavit he submitted for a search warrant, he replied, "As far as my recollection goes," I was not questioned on that. And if I was, I would have again invoked my constitutional privileges" (41).

^{*/}He denied that the real reason he got a search warrant for the Sims and Cameron homes was to steal money he believed was present there (43).

He said he had made notes of the observations on May 18, 1971*/ that he later put in the affidavit but he did not believe he put these in him memo book and he probably threw them away (44-45). His memo book for May 19, 1971 said only "1115 hours to approximately 1545 hours, vicinity of Linden and 197th and Farmers and New York regarding search warrant observation; "none of his specific observations were in the memo book and he did not know if Police Department regulations required that such observations be written down (49-50).

Although he could not remember numerous details the officer was able, after looking at his affidavit, to testify that on May 18, 19 and 20 he saw appellant Sims receive what he believed were policy bets at the front door of his and the Camerons' house (55-67).

Henry Schnitzer testified that he was an expert on "policy" (72). He testified that in playing policy no one takes policy bets after the time that the third race is finished because after that race is finished the first number of the day's policy number can be ascertained (74-76). Therefore, no policy banker would take a bet after 2:00 p.m. (76) (and officer Bonino said he saw Sims allegedly taking policy slips after 3:00 p.m. [65]).

- 7 -

^{*/}His affidavit for the warrant recited observations on May 18, 19 and 20, 1971. Only for May 18 (the date for which no memo was available) were Sims' actions detailed in the affidavit; for the 19th and 20th it was merely said that the May 18 actions were repeated "to the letter."

Edith Cameron testified that contrary to officer Bonino's testimony no one other than Stanley Sims entered her home between 11:30 a.m. and 2:30 p.m. on May 18, 1971; Sims stayed through the evening when the rest of the defendants also arrived (79-80).

Juanita (Jennie) Sims also testified that, contrary to officer Bonino's testimony, that no one came to her home on May 18, 1971 between 2:55 and 3:30 P.M. (82).

Both sides then rested, the District Attorney having declined to present any evidence (84).

OPINION BELOW

Justice Brennan denied the motion to controvert in an opinion rendered August 14, 1973.*

The pertinent portions of this opinion are as follows:

In its decision the Appellate Division stated:

"In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attacked on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 N.Y. 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent

ted, the District Atter

^{*} The full text of which is set forth in the Appendix.

grand jury proceedings were not conclusively refuted by the People. However tenuous the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra, p. 186)."

inc

The thrust of defendants' argument is that they have supported the burden, urging the theory that once a police officer availed himself of the privilege of exersing the Fifth Amendment, it became incumbent upon the People to refute the admission of perjury inherent therein. This conclusion implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. This Court doubts that the men who wrote that privilege into the constitution intended that any person who availed himself of it thereby automatically conceded an admission of perjury. On the contrary, it would appear that by permitting a person to exercise such privilege, they were recognizing his right to protect himself without committing perjury.

However, careful examination of the questions propounded with respect to which the privilege was exercised is necessary to help determine whether the answers thereto, if given, might significantly aid the Court in determination of the truth or falsity of the affidavit made in support of the warrants. The only such question in which reference was made to the affidavit apprears on page 41

of the Minutes as follows:

"Q Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.

A As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional priviliges.

The witness was closely questioned at considerable length concerning the preparation of the affidavit, the reasons for it, the observations of the witness, the facts and circumstances preceding the execution of it, to all of which the defendant testified freely without once asserting his constitutional rights. From the foregoing, it is obvious that the witness invoked his constitutional rights only when asked about police conduct in connection with the execution of the warrant and not with respect to affidavit preceding it.

This Court cannot agree with defendants' basic argument, to the effect that a police officer having asserted his said constitutional rights with respect to conduct involved in the execution of the warrants, all of which were subsequent to the execution of the challenged affidavit thereby impugns the truth of the contents of the affidavit. Even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conclusion that the affidavit was perjurious would be without foundation. Carrying the assumption a step further, the Court cannot assume or conclude that because a police officer asserts his constitutional rights to avoid a forced disclosure of his possible participation in criminal conduct that he was necessarily guilty of perjury in the execution of the said affidavit. The Court's previous comment with respect to the limits of the area in which the police officer witness availed himself of the privilege, and the fact that he testified freely with respect to his conduct prior to and in connection with the excution of the affidavit, are here pertinent. The Court finds that the proof offered by

prescribed in People v. Alfinito, supra, by which even a fair doubt arising from the testimony would have to be resolved in favor of the warrant. The Court holds that no doubt has been cast upon the truth of the contents of the affidavit submitted in support of the warrants. The defendants failed to sustain the burden of proof. The findings of this Court are as set forth in the foregoing.

This appeal followed.

ARGUMENT

POINT I

APPELLANTS SUSTAINED THEIR BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT OFFICER BONINO COMMITTED PERJURY.

In <u>People v. Alfinito</u>, 16 N.Y. 2d 181, 186 (1965) the Court of Appeals said that in a hearing where it is claimed that the affidavit underlying a search warrant was based on perjury:

[T]he burden of proof is on the person attacking the warrant...and...any fair doubt from the testimony at the suppression hearing as to whether the affidavit's allegations are perjurous should be resolved in favor of the warrant....

This means that the appellants must have proven perjury by a preponderance of the evidence (People v. Irizarry, 64 Misc. 2d 49, 53 [Crim.Ct.N.Y.Co., 1970]; People v. Boyd, 57 Misc. 2d 769, 771 [Dist.Ct., Nass.Co., 1968]), and it is clear that they supported this burden. */

Would note their objection to this burden on the ground that the People, at the least, should have the initial burden of going forward with sufficient proof which, if believed, would make out a prima facie case of no perjury. Cf. People v. Baldwin, 25 N.Y.2d 66, 70 (1969); People v. Rahming, 26 N.Y.2d 411, 416 (1970).

The hearing court was treated to the bizarre spectacle of a police officer who is accused of perjury taking the Fifth Amendment.*

Appellants contend that they supported their burden as a result of this action alone. Cf. People v. Cardaio, 18 N.Y. 2d 924, 925 (1966) (Where "the source of the information upon which the police base probable cause denies that he is the source, it is incumbent upon the People to go forward with sufficient competent evidence to refute the denial"). By anology, Officer Bonino's taking the Fifth constitutes an implied denial that he made the sworn obervations, raises an implication of perjury. and requires that the People come forward with some evidence to refute this implication.

It is perfectly proper to make adverse comment on the fact that a party availed himself of his Fifth Amendment privilege, so long as the party is not the defendant. DeLuna v. United States, 308 F. 2d 140, 141 (5th Cir., 1962). This is even more the case when the party takes the stand and becomes a witness, for the privilege is largely waived. See 147 ALR 255. This is analogous to a situation where a defendant testifies but does not explain some incriminating evidence—"That was a circumstance which the jury was entitled to consider...He was not obliged to become a witness, but having done so, his conduct as a witness must be measured by the same standards as apply to the conduct of other witnesses." People v. Connolly, 253 N.Y. 330, 341 (1930).

^{**/} The lower court rejected this contention on the erroneous ground that it "implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. (Emphasis added). Appellants would contend that equating the exercising of privilege with an assumption of perjury has a great deal of factual validity in the circumstances of this case. Furthermore, the legal validity of this equation also has great merit. Policemen are

The People, however, for reasons of their own, saw fit not to call Bonino's named partners, one of whom was present during the alleged observations and the other one of whom was present at the arrest. In People v. Harrington, 70 Misc. 2d 303 (Alleghany Co.Ct., 1972) a defendant had accused a named police officer of coercing his confession. When the People did not call him, the court granted a motion to suppress, stating:

In view of the completely uncontradicted testimony of the defendant, after notice in the moving papers that an alleged threat by a named police officer would be proved, the failure to produce such officer by the People will be viewed in the light that the version of the missing witness would not controvert such proof. Id. at 304.

The lower court attempted to distinguish Harrington on the ground that the appellants had the burden of proof here (Harrington involved a Huntley hearing where the burden is upon the People) and the officers here were known and available to both sides. This purported distinction overlooks two facts: Firstly, that appellants contend that Officer Bonino's taking of the Fifth Amendment did place a burden of reputation on the People; and, secondly, that while pol 'e officers are theoretically available to both sides they are practically unavailable to give favorable testimony for a defendant (as was demonstrated by Officer Bonino's testimony).

quasi-public persons who, while they have an absolute right to the Fifth Amendment when defendants on a criminal case, have no such absolute right in other situations. Since they may be disciplined or even fired for taking the Fifth Amendment (Gardner v. Broderick, infra) and since, when not defendants, their taking of the Fifth may be adversely commented upon (see preceding note) it is wholly proper to contend that when a policeman accused of perjury takes the Fifth Amendment this raises some implication of that perjury.

It is true that, in between instances of claiming his privilege, Officer Bonino did testify that he did make the observations in the contested affidavit, but such testimony is entitled to little weight. The offcer was unable to give even this testimony until after he had seen the affidavit and even then the lack of detail was noticable. The testimony was replete with "I don't know" and "I don't remember" and by giving such answers he was "in fact although not in form refusing to testify as to what he did." Matter of Second Grand Jury v. Cirillo,

book for May 18, 1972, the sole document which might have corroborated his testimony that he did make the claimed observations, was never produced by the witness or the prosecutor. As far back as People v. Malinsky, 15 N.Y. 2d 86,90 (1965) the Court of Appeals has emphasized the importance of a police officers notes as a defense tool***/ and their absence here is particularly significant since they are the only objective evidence of what really happended on May 18th. Where a witness has taken the

^{*/}The lower court made much of the alleged distinction between Bonino's claim of privilege re: the facts surrounding the execution of the warrant and his giving testimony about the observations that went into the affidavit for the warrant. However, this completley overlooks the fact that when Bonino was asked if he had been questioned by a Federal grand jury about the truthfulness of this affidavit he replied "If I was I would have involved my constitutional privileges" (41).

^{**/}The memo book for the 19th contained no detail, reciting only that Sims repeated the previous days activities.

^{***/}Convictions have been reversed for the failure to produce these notes. People v. Persico, 24 N.Y. 2d 758.

Fifth Amendment and the burden is on the caller to establish perjury," 'a right sense of justice' [particularly] entitled the defense to ascertain what the witness said about the subject under discussion on an earlier occasion". Ibid. The failure of the prosecutor to produce these papers must weigh heavily against the People.

affidavits taking the Fifth Amendment is analogous to the situation where the prosecutor refuses to disclose the identity of an informant (It is even more harmful in the former situation because of the burden on the appellants). To paraphrase this Court in People v. Griffith, 25 A.D. 2d 756, 757 (2d (Dept., 1966), taking the Fifth Amendment "deprived the defense of the opportunity of showing that there was perjury in the affidavit" and since the deprivation came about via the actions of a law enforcement officer it must redound to the prejudice of the People. In other words, to the extent that officer Bonino's actions are considered as preventing appellants from supporting their burden of proof, the fault for that must lie with the People. See also People v. Boniface, 37 A.D. 2d 728 (2d Dept., 1971) and People v. Asaro, 34 A.D. 2d 968 (2d Dept., 1970).

^{*/}It must be noted that if the People, who asked Bonino not a single question, wanted to get at the truth they could have demanded Bonino sign a waiver of immunity at pain of losing his position. New York City Charter Section 1123 and New York State Constitution Article I, Section 6. See Gardner v. Broderick, 393 U.S. 273, 275 276 (1968). Instead, they opposed revealing the truth by repeatedly objecting to defense counsel's questions of Bonino, even after Bonino secured an attorney, and by introducing no evidence of their own.

The foregoing has focused only on the testimony (or <u>lack</u> of testimony) of Bonino. Three other witnesses testified for appellants and their testimony was uncontradicted. Henry Schnitzer testified that no policy banker would accept plays as later in the day as Bonino said he saw Sims taking them, and both Edith Cameron and Jennie Sims denied that the men Bonino said had given Sims the policy slips have ever come to their homes.

In sum, the uncontradicted testimony of these three witnesses plus the taking of the Fifth Amendment by Officer Bonino constituted more than a preponderance of the affirmative evidence that the search warrant was based on perjury. Accordingly, the denial of the motion to controvert must be reversed.

POINT II

APPELLANTS PRESERVE FOR FURTHER APPELLATE REVIEW THEIR CONTENTIONS THAT THE AFFIDAVIT DID NOT SET FORTH PROBABLE CAUSE.

^{2/}Bonino's failure to produce his memorandum book and the People's failure to call Bonino's brother officers are further, negative evidence that the warrant was perjured.

CONCLUSION

FOR THE ABOVE STATED REASONS THE ORDER DENYING THE MOTION TO CONTROVERT AND MOTION TO SUPPRESS MUST BE REVERSED.

Respectfully submitted,

DILLER & SCHMUKLER
Attorneys for DefendantsAppellants

299 Broadway New York, N. Y. 10007 (212) 349-5554

JOEL A. BRENNER
1501 Franklin Avenue
Mineola, N. Y. 11501
(516) 294-9490
of counsel

DITALL & ECHACKIA

APPENDIX

APPENDIX

TABLE OF CONTENTS

Decision Directing Alfinito Hearing: 40 A.D.2d 1034-1035
Transcript of Hearing, Dated 6/5-6/7/73
Opinion Below: William C. Brennan, Justice

PPLADI.

DECISION DIRECTING
ALFINITO HEARING
(40 A.D. 1034-1035)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EDITH M. CAMERON, STANLEY T. SIMS, KENNETH DAVIS, ROBERT S. WILLIAMS, MARVIN CAMERON, and JENNIE SIMS, Appellants .--Appeal from six judgments of the Supreme Court, Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas and imposing sentences. The appeal brings up for review two orders of the same court, dated November 30, 1971 and January 25, 1972, which, respectively, denied their two successive motions to suppress evidence. Cases of the six defendants remitted to the Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in the affidavit upon which the search warrants were issued were perjurious. In the interim, the appeals will be held in abeyance. On May 21, 1971 three search warrants were issued and executed upon a affidavit by a police officer which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. Defendants moved to controvert the warrants and to suppress the evidence seized. The right to a hearing was waived and the motion was argued solely on the ground of the legal sufficiency of the underlying affidavit. The motion was denied by order of November 30, 1971. In our opinion, the Criminal Term properly found that the statements contained in

tor review to

the affidavit made a sufficient showing of probable cause to justify the issuance of the warrant (People v. Smith, 21 NY 2d 698; People v. Valentine, 17 NY 2d 128; People v. Meyers, 38 AD 2d 484; People v. White, 16 NY 2d 270; United States v. Ventresca, 380 US 102, 108-112). Defendants subsequently moved to suppress the evidnece seized on the ground that the affidavit contained perjured testimony and requested a hearing on that issue. The motion was supported by an affirmation by defense counsel stating, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal Grand Jury had been convened to inquire into the conduct of the arresting officers in this case; that the officers had refused to testify on the ground of self-incrimination; and that the affidavit upon which the warrant had been issued contained perjured testimony. In opposition, the People stated that the United States Attorney's Office had informed them that although officers involved in this case had been called before a Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied by order of January 25, 1972. In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attacked on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 NY 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent Grand Jury proceedings were not conclusively refuted by the People. However tenuous

the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, Supra, p. 186). Shapiro, Acting P. J., Gulotta, Christ, Brennan, and Benjamin, JJ., concur.

r colvec in

., Christ, abendar, and serie

HEARING (6/5-6/7/73 SUPREME COURT : QUEENS COUNTY CRIMINAL TERM : PART XII THE PEOPLE OF THE STATE OF NEW YORK Indiat. No. -against-2116-71 JENNIE SIMS, -and-EDITH CAMERON

> STANLEY SIMS KENNETH DAVIS ROBERT WILLIAMS MARVIN CAMERON,)

> > Defendants

General Court House 88-11 Sutphin Blvd. Jamaica, New York

June 5, 1973

THE HONORABLE WILLIAM C. BRENNAN.

For the People:

HON. MICHAEL F. ARMSTRONO District Attorney, Queens County By: WILLIAM S. LEAHY, ESQ., Assistant District Attorney

For the Defendants: NEW YORK PHINEAS FLOMENHAFT

HOWARD J. DILLER, ESQ. 299 Broadway New York, N. Y.

OFFICIAL SUPREME COURT REPORTER GENERAL COURT HOUSE JAMAICA, N.Y. 11435

THE CLERK: Indictments No. 2115 and 2116 of 1971, People against Jennie Sims, Edith Cameron, Stanley Sims, Kenneth Davis, Robert Williams and Marvin Cameron.

All the defendants are present and seated at the counsel table with their attorney, Howard J. Diller. Assistant District Attorney William S. Leahy is present for the People.

THE COURT: Mr. Diller, at this time I want to tell you and the Assistant District Attorney I require a copy of the minutes of this hearing.

I am going to reserve decision and I will need a copy of the minutes.

MR. DILLER: Yes, your Honor. I will also order a copy.

THE COURT: This is a hearing to be held pursuant to an order of the Appellate Division to determine whether or not pre-search warrants were issued on May 21, 1971 by an affidavit of the police officer, which describes certain activities, were in fact perjurious.

Call your first witness

MR. DILIER: I call Police Officer Bonino.

LUCIDO BONINO, Shield No. 7514, a Police
Officer of the New York City Police Department,
assigned to the 67th Precinct, having been first
duly sworn, was examined and testified, as follows:
DIRECT EXAMINATION

BY MR. DILLER:

- on or about May 18, 1971, were then engaged as a police efficer in the New York City Police Department?
 - A Yes, sir.
 - Q Where were you assigned at that time?
 - A The 16th Division of Queens.
- Q For how long had you been assigned to the 16th Division on about May of '71?
- A For approximately three to four weeks -approximately a month, a little longer.
 - Q And prior to that time where were you assigned?
 - A To the 10th Division plain clothes.
 - Q How long were you attached to the loth Division?
 - A little over two years. old No. THE COURT: Where is that located, Officer?
 THE WITNESS: That's intercoklyn.

ile ux minud and costified

- Q How long have you been as of the present date in the New York City Police Department?
 - A Ten years this month.
- Q And how long were you attached to plainclothes duties during that 10-year period?
 - A Approximately 39 months or so.
 - Q A little over three years?
 - A That's correct.
- Q And most of that activity in plainclothes concerned investigations of gambling activities, is that correct?
 - A Correct.
- Q And in connection with your investigations of gambling activities you have made numbers of arrests, is that correct?
 - A That's correct.
- Q And there were times that you testified in court in connection with those arrests, were there?
 - A Yes.
 - Q Many times? You been as or th.
 - A . Numerous times. a Department?
- Q And during that period of time when you testified you were qualified as an expert by the Court, were you?

that that lo-ye is period?

9 months or so

- A Correct.
- Q On a number of separate occasions?
- A Correct.
- Q In connection with your work in the 16th .

 Division on or about May 18, 1971 where were you specifically working that day, do you recall?
 - A Assigned to the 16th Division.
 - Q And with whom were you working?
 - A With Officer Barry Fratello.
 - Q Were you working with any other officer?
 - A I don't believe so.
- . Q Were you working under anyone's direct command at that time?
- A When we turn out in the mornings we are under the command of the supervisor.
- Q I have special reference to the work on the 18th, the investigation of Stanley Sims. Were you working in connection with the tinvestigation under the direction of any particular supervising officer?
 - A You mean there at the scene?
 - Q .. Yes. mile oparate occasion
 - A No.
 - Q Do you see Stanley Sims in court?

. 19 18, 1971. where

web recall?

- A Yes, I do.
- Q Will you point him out.
- A Right here (indicating).
- Q The third fellow on the left with glasses?
- A Yes.

MR. DILLER: Indicating Stanley Sims.

- Q Had you ever seen Stanley Sims prior to May 13, 1971?
 - A Yes.
- Q And on how many prior occasions had you seen him?
 - A I don't recall.
- Q Did you ever make a report with respect to your observations of Stanley Sims prior to May 18, 1971?
 - A Yes, I believe we did with another officer.
 - Q Do you have those reports with you today?
 - A No, I don't.
- Q Did you make any reports with respect to any observations made by you on the 18th day of May 1971?
 - A There were memo book entries.
 - Q Do you have those memo book entries with you?
- A I don't have the memo books. I believe we may have some in the files, a photostat copy of them.

ting Stunies

MR. DILIER: At this time, I respectfully ask to see those memo book entries, if it please the Court.

THE COURT: Show them to counsel if you have them. Mr. Leahy.

Do you have them?

THE WITNESS: Your Honor, this here photostat only starts with May 19, 1971.

THE COURT: What are you inquiring about?

MR. DILLER: I'm asking for the 18th. I don't have a copy of the 18th.

- Q You did prepare memo book entries?
- A Yes.
- Q Do you have photostatic copies of the 18th anywhere, in your office or home?
- A The books I believe were turned into the 16th Division office. After we finish with a book we turn it into the office.
- Q so as far as you know, those original memo
 - A They should be at the 16th Division.
- Q And you have here only the photostatic copy of your activities on the 19th, is that correct, of May?

- A The 19th through the -- it runs through May 24th.
 - Q May I see them, please, commencing on the 19th.
 - A Yes (handing to Mr. Diller).
- Q Now, directing your attention to May 18th, what time did you start work on that day?
- A I'm not sure if it was 8 a.m. or 9 a.m., somewhere around there.

THE COURT: You are talking about the 18th now, not the 19th?

MR. DILLER: The 18th.

THE COURT: Do you understand that, Officer?

THE WITNESS: I'm really not sure. It may have
been 8, 9, somewhere around there.

MR. IEAHY: If your Honor please, at this time, since counsel is looking at memo book entries, I think it might be proper to offer them to the officer to see if they refresh his recollection.

THE COURT: The officer already identified them as containing records from the 19th through the 24th. Isn't that correct, Officer?

THE WITNESS: That's correct.

MR. DILLER: These questions are with respect

to the 18th.

THE COURT: I know they are.

Q Did there come a time that you went to the vicinity of 197th Street and 116th Avenue in St. Albans, Queens?

A I believe that's the address of Mr. Sim's residence.

- Q That's correct.
- A That would be true.
- Q What time did you approximately get to that yieinity?

THE COURT: On the 19th?

MR. DILLER: On the 18th.

THE WITNESS: May I check that, your Honor?

THE COURT: Check what?

THE WITNESS: On the search warrant itself.

The time would be approximately that time.

THE COURT: He says he needed search warrants to refresh his recollection.

THE WITNESS: I have a copy here.

THE COURT: Yes, go shead. Is this 1971,

Officer?

THE WITNESS: That's correct, your Honor.

tamb. uhat. you

THE COURT: Does that refresh your recollection?

- Q Why don't you read the search warrant?
- A It's approximately ten after 11 in the morning.
- Q After reading the search warrant, that refreshes your recellection, does it?
 - A Just for the time.
- Q And were you alone at that time or were you with a brother officer?
 - A I was with a brother officer.
 - Q That was Police Officer Fratello?
 - A Yes.
 - Q And were you in an automobile at that time?
 - A Yes.
- Q Was it a department automobile or a private automobile?
 - A Private automobile.
 - Q And was that your automobile or your partner's?
- A I don't remember if it was mine or my partner's that day.
- Q Do you recall if you were driving or if your partner was driving?
- A I'm not sure. I believe I was driving though.
 I would say I was.

Now you can look at your affidavit to refresh your recollection. Could you observe seeing Mr. Sims at any time on the 18th of May of '71?

A Yes, according to my affidavit here from my warrant.

Q Do you recall where you were parked, if indeed you were parked, when you made the first observation of Mr. Sims?

- A You mean on the 18th?
- Q On the 18th.
- A No, I don't recall.
- Q When you made your first observation of Mr.
 Sims, would you please explain to the Court where you made these observations?
 - A You are speaking of the 18th now?
- Q Everything I speak of is of the 18th at the present time.
- A From his residence, we were seated in an auto and we observed him from the auto, from our auto.
 - Q Was your auto parked in front of his residence?
- A It would not have been parked directly in front,
 - 2 You don't have any recollection where you were

parked?

- A Exactly where, no.
- Q Do you have a recollection of approximately where you were parked?
- A I couldn't say. It may have been off the side street. It may have been on the avenue further down.

 I really don't know.
- Q At the time you saw Stanley Sims, did you know that was Stanley Sims?
 - A Yes.
- Q Had you ever previously spoken with Stanley
 Sims?
 - A No.
 - Q How did you know it was Stanley Sime?
- A He had been pointed out from pictures and on a previous observation.
 - Q Wio pointed him out on pictures?
 - An officer I was working with at this time.
 - Q And do you recall when that was?
- A It was sometime before that. I have no idea when the date would have been.
 - Q Did you ever arrest Stanley Sims previously?

- A No, I did not.
- Q And you never participated in his arrest, is that right?
 - A No, I didn't.
 - Q. What time was it that he left his house?
 - A At approximately ten after 11 in the morning.
- Q And did he leave his house alone or was he with somebody?
 - A He left his residence alone.
- Q And then you observed him enter a 1970 Plymouth in accordance with the affidavit you prepared, is that right?
 - A That's correct.
 - Q And did you observe where he went?
 - A Yes, to 145-40 New York Boulevard in Jamaica.
 - Q Do you know whose residence that is?
 - A I have later learned.
 - Q Whose residence was that?
 - A Mr. and Mrs. Cameron.

MR. DILLER: I am going to ask that these two photographs be marked for identification.

(The items referred to, two photographs, were marked Defendant's Exhibits A and B for identification)

for show mo dore in:

THE COURT: The warrants have already been ruled on. The only question is of perjury.

MR. DILLER: That's correct.

THE COURT: You are not going to go through the whole hearing --

MR. DILLER: This is the first hearing on the question of this warrant.

MR. LEAHY: This hearing is limited solely on the question of whether or not the affidavit was perjurious.

THE COURT: We are not going to go through the whole observation until you have something to indicate that perjury was made here.

. MR. DILLER: This is just a foundation.

THE COURT: I will give you some leeway, counselor, but we are not going to go through the entire --

MR. DILLER: This is just as to the warrant.

BY MR. DILLER: (Continuing)

Q Officer, I show you these two photographs and ask you if they look familiar to you.

A I believe Exhibit A is Mr. Sim's house and Exhibit B would be the Cameron house. I believe, I'm not sure.

THE COURT: In your affirmation, counsel, you indicated "upon information and belief that as a result of testimony given before the Knapp Commission a federal grand jury had been convened to inquire into the conduct of the arresting officers in this. case." That is all I am interested in right now.

MR. DILLER: The only thing is, my understanding has been that we are attacking the perjurious statements made by the police officer.

THE COURT: You are attacking them on the grounds that the Knapp Commission had been convened to inquire into the conduct of the arresting officers in this case. That is the sole grounds.

MR. DILLER: We are attacking the veracity of the statements made in the affidavits.

THE COURT: Based on the fact that the Knapp Commission had been convened to inquire into the conduct of the arresting officers in this case.

other basis is that the statements made by the officer in his observations were not consistent with the truth, and there is tostimony to be adduced

R. Dich Ry The only thing is,

at this trial to indicate that the statements of the officer, of his observations were indeed not truthful and indeed never occurred, and, therefore, a perjured affidavit was submitted application for a search warrant. This is in conjunction with other questions of the credibility of the officer.

THE COURT: You also stated the officers had refused to testify on the grounds of self-incrimination and the affidavit upon the warrant had been issued contained perjured statements. That is what you said.

MR..DILLER: This is in addition to the other perjurious statements in the affidavit.

THE COURT: What other perjurious statements?

MR. DILLER: Which we are going to develop now.

THE COURT: Let us get back to the original affidavit that the Appellate Division ruled on.

MR. DILIER: The Appellate Division ruled that we should have a hearing with regard to the affidavit of the search warrant.

THE COURT: The Appellate Division said that
you had an affirmation in here indicating that this
case had been investigated before the Knapp Commission

and a federal grand jury had been convened to inquire into the conduct of the arresting officer in this case. If you have any proof of that, I will hear it. I don't want to hear anything else. Then after I hear that, then we will go into the affidavit. I want to know first if there is any substance to that statement.

MR. DILLER: Is your Konor saying now that
your Honor doesn't want to hear testimony of this
witness with respect to his observations that were
reported in an application for a search warrant
which we are prepared to introduce witnesses and
take testimony on?

THE COURT: Not unless you set a foundation that this particular case was investigated before the Knapp Commission, which you said in your application, and that a federal grand jury had been convened to inquire into the conduct of the arresting officers in this case. If you show me that, then I will let you so further. But that is what I want to hear first.

Incidentally, and I recall the case, a bare affirmation, the federal U. S. Attorney denied

o, thon we will

that there had been any investigation into this case.

MR. DILLER: We have a living witness now who can tell what happened.

THE COURT: Let us bring somebody down from the federal U. S. Attorney's Office. Let us find out if there was an investigation.

MR. DILIER: I want to lay the foundation through this witness first.

THE COURT: Lay the foundation. If you do
that, I will permit you all the leeway in the
world as far as the warrant is concerned. But
I want to see something about the original affirmation that a federal grand Jury had been convened
to inquire into the senduat of the officers in
this case.

BY MR. DILLER: (Continuing)

- Q Officer Bonino, were you subposensed to testify or requested to testify before any grand jury in connection with your investigation of Stanley Sims?
 - A I would have to answer that no.
 - o You say you would have to answer it no?
 - A That's right. paned.

d. .. Attornay's Office.

N. Lat us bring somebody

- Q Did you ever receive a subpoena to testify before the Queens County Grand Jury in sonnection with this case?
 - A I misinterpreted your first question.
 - Q I'm asking you another question --
 - A Did I ever receive --

MR. LEAHY: Let us straighten it out, Judge. The witness said he misinterpreted the question.

THE COURT: Read the question and answer to the Officer.

(The Court Reporter then read as follows:

"Question: Officer Bonino, were you subpoensed to testify or requested to testify before any grand Jury in connection with your investigation of Stanley Sims?

"Answer: I would have to answer that no.")

THE WITNESS: I would have to retract that. I was under the impression you referred to the federal grand jury. Yes, we did testify before a Queens grand jury.

THE COURT: Were you ever subpoensed before a federal grand jury to testify in this case?

skilly you mother question

THE WITNESS: No. your first qu

Q Were you subposensed before a federal grand Jury in either the Southern District of New York or the Eastern District of New York in connection with anything of the outgrowth of this case?

MR. LEAHY: Objection.

THE COURT: Sustained.

- Q Did you appear before a federal grand jury in connection with your investigation and duties in connection with the Stanley Sims investigation?
- A That's the federal grand jury you are asking now?
 - Q I said the federal grand jury.
- A And this is with my investigation of Stanley Sims?
- Q In other words, your work in connection with your investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest.

THE WITNESS: Your Honor, I request to take the Fifth Amendment on this question.

THE COURT: Let us take a recess at this point.

Mr. Leahy, Mr. Diller and the witness will come
into chambers.

Do you have an attorney here, Officer?

. Objection.

Suctained.

THE WITNESS: No, your Monor. (Brief recess)

APTER RECESS

(All parties, as previously noted, were present.)

THE COURT: Do you have a copy of the decision,

tr. Diller?

MR. DILLER: Yes, your Honor.

THE COURTS And Mr. Leany?

MR. LEAHY: Yes, I do, your Honor.

THE COURT: In view of the last question and the last answer of the witness, we had a conference in chambers with the district attorney, Mr. Diller and the witness. Mr. Leahy, do you have an application at this time?

MR. LEAHY: Yes, your Honor. At this time, the People would move for a recess until 11 o'clock tomorrow morning to afford the witness an opportunity to speak with his personal attorney.

THE COURT: I would like his attorney to be here, if possible, tomorrow morning.

THE WITNESS: Yes, your Honor, I'll call him.
THE COURT: Recess until tomorrow morning at

de previously n

no you have a copy

11 o'clock. Bail continued.

MR. LEAHY: No objection to the continuation of bail.

(Trial adjourned to Wednesday, June 6, 1973 at 11 a.m.)

Jamaica, New York.

HEARING CONTINUED

Befores

THE HONORABLE WILLIAM C. ERENNAN,

Justice

Appearancest

HON. MICHAEL F. ARMSTRONG
District Attorney, Queens County
EX: JOSEPH G. GOLIA, ESQ...
Assistant District Accorney

HOWARD J. DILLER, ESQ.
Attorney for Defendants

THE COURT: Mr. Diller, Police Officer Bonino was on the stand and just subsequent to his answer to the last question the Court took a recess and he indicated he wanted to have his attorney here this morning. I understand his attorney is here and he has a problem.

Would you note your appearance, counselor.

MR. WASHOR: Washor & Washor, by Leon Washor, 16 Court Street, Brooklyn, New York, attorney for. Patrolman Lucido Bonino.

I have an application. In a conference in chambers I indicated to the Court that we have a jury in Kings County before Judge Mollen in Part 25 where the charge was completed this morning and the deliberation will be with the jury some time this afternoon. My associate, attorney for one of the defendants, will be engaged in another Department trial at Police Headquarters and I have made arrangements to sit in for the purpose of the deliberation in the event any questions are determined and the jury is brought back before the Court.

so, therefore, I will keep myself free tomorrow, with the approval of the Court and the District Attorney, to put this case over to 11 o'clock tomorrow and I will be here.

THE COURT: You will be here tomorrow morning at 11 o'clock?

MR. WASHOR: Either I or if for some reason we get lucky with the jury in Kings County the other associate will be here; our

before . Judie

arre was compl

THE COURT: In any event, whether counsel is here or not we will proceed at 11 o'clock tomorrow morning.

MR. DILLER: I have no objection.

THE COURT: And I understand the District
Attorney has no objection?

MR. GOLIA: No objection, your Honor.

THE COURT: In view of that, we will recess until tomorrow morning at 11 o'clock.

I suggest you be here at a quarter to 11.

I will clear the calendar and get to this hearing right away.

Bail is continued on the defendants.

(Hearing is adjourned to Thursday, June 7, 1973 at 11:00 a.m.)

General Court House Jamaica, New York June 7, 1973

HEARING CONTINUED

Befores

THE HONORABLE WILLIAM C. BRENNAN,

Justice

Appearances:

HON. MICHAEL F. ARMSTRONG
District Attorney, Queens County
By: JAMES C. MOSLEY, ESQ., and
BRENT BLACKSBURG, ESQ.,
Assistants District Attorney

HOWARD J. DILLER, ESQ., Attorney for Defendants

Also Present:

LEON WASHOR, ESQ.
Attorney for witness Lucido Bonino

THE CIERK: All the defendants are present,
Assistants District Attorney James C. Mosley and
Brent Blacksburg are present for the People, and
Howard J. Diller, attorney for the defendants, is
present.

His Honor has excluded all witnesses until called to testify. If there are any witnesses in this case you are to leave the courtroom until

called to testify. .

THE COURT: All right, the witness may resume the stand.

Police Officer L U C I D O B O N I N O , called

as a witness by the Defendants, having been

previously duly sworn, resumed the stand and

testified further, as follows:

MR. WASHOR: Your Honor, may I make an application. I was directed to appear this morning as Patrolman Bonino's personal counsel.

My name is Leon Washor, 16 Court Street, Brooklyn, New York, representing the witness Patrolman Bonino. And for the purpose of convenience, Judge, may I be seated here so that if the witness wishes to confer with me I may be here to advise him on his rights.

MR. DILLER: No objection.

THE COURT: Now, counsel, while you are here, on page 20 of the minutes -- do you have a copy of the minutes?

MR. WASHOR: Judge, I read the minutes. Counsel was good enough to let me see the testimony of the

previous day. I am aware of it and familiar with the situation.

THE COURT: At the bottom of the page, the following question was asked of the Officers

"In other words, your work in connection with your investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest?"

The witness then replied: "Your Honor, I request to take the Fifth Amendment on this question."

The Court then said: "Let us take a recess at this point."

THE COURT: Did you want that question repeated?

MR. WASHOR: I will let counsel conduct his

MR. MOSIEY: I would object to the form of the question. It is three questions in one.

THE COURT: At this point then the objection is sustained and the answer is stricken.

Continue, Mr. Diller.

MR. DILLER: I didn't ask any questions.

THE COURT: He is objecting to the last
question I just read.

MR. DILLER: There was no objection made at that time, and an objection would be untimely if made at the present time.

THE COURT: I will permit the objection and
I will sustain the objection. The answer is
stricken. If you wish to reframe the question,
you may. Let us continue.

CONTINUED DIRECT EXAMINATION BY MR. DILLER:

Q Officer Bonino, in connection with your investigation of Stanley Sims, did you testify before the Grand Jury in that matter.

MR. MOSLEY: What Grand Jury, your Honor?

THE COURT: Are you objecting, Mr. Mosley?

MR. MOSLEY: Yes, your Honor.

THE COURT: I will sustain an objection as to form. Any particular grand jury?

MR. DILLER: First of all, who are my adver-

THE COURT: Mr. Leahy is not here. The District

Attorney's Office is represented by Mr. Mosley and Mr. Blacksburg.

MR. DILLER: Is your Honor going to permit each of the two counsel to object at any time, because normally the procedure is if there are two counsel one --

MR. BIACKSBURG: I defer to Mr. Mosley, your Honor.

Q Were you subposned to testify before a federal grand jury in connection with Stanley Sims?

THE COURT: At any time you wish to confer with your counsel, Mr. Bonino, you may.

MR. DILLER: Also I would ask that the witness not look over at the district attorney for any comment. I observed that the last time. I meant to bring that to your Honor's attention.

THE COURT: I haven't noticed that.

MR. DILLER: Yes, because you are not in a position to see it like I am.

THE COURT: But I will advise the witness to answer the question. If he feels he wants to consult with his attorney, he has the Court's permission to do so.

A I was subposensed before a federal grand jury.

In reference to the Sims case, I would have to say no,
not directly.

Q You say "not directly." Were there questions asked of you in that grand jury with respect to your investigation of the Sims case?

A I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges.

Q You say if there were any questions you invoked your constitutional privilege at that time?

A That's correct.

Q Were you questioned by this federal grand jury concerning the disappearance of \$80,000 in cash?

MR. MOSLEY: Your Honor, I object at this time. Can we fix a time that this occurred? "Is it preceding this case?

THE COURT: The objection is sustained.

MR. DILIER: In connection with the last question, the time that Mr. Mosley objects to, I don't understand the objection. Is it the time of the grand jury or the time of the missing of

the money?

THE COURT: I don't understand your question.

You just said it was a question about \$80,000. What
\$80,000? I don't know anything about the \$80,000.

MR. DILLER: Let me rephrase the question so that this witness will clearly understand and Mr. Mosley will understand, too.

THE COURT: And I would like to understand, too.

MR. DILLER: And your Honor, too.

- Q There came a time that you arrested Stanley Sime, is that correct?
 - A That's correct.
- around the table in this courtrocm?
 - A That is correct.
 - Q When did this arrest take place?
 - A On May 21, 1971.
- a seigure made by you and your follow officers?
 - A A seizure of what?
 - Q . Cr drugs.
 - A Yes, there was.

- Q Was there a seizure of money made?

 MR. MOSIEY: I object, your Honor, immaterial.

 THE COURT: Overruled.
- A Yes, there was.
- Q Was there a seigure of money?
- A Yes, there was.
- Q How much money was seized?

MR. MOSIEY: I object again, your Honor. It is immaterial to the decision, the Appellate Division decision.

THE COURT: I will take it.

THE WITHESS: May I refer to some notes?

THE COURT: The witness has asked to refresh his recollection, Mr. Diller.

MR. DILIER: I have no objection, of course.

- A The seizure was made you specifically want on that particular day, on the 21st?
 - Q That's correct.
 - A Approximately \$44,000 or so, approximately.
 - Q In currency, is that right?
 - A Yes, that's correct.
- Q Was that from the Sims' home or from the Cameron home or from either?

- A I believe it was from both homes.
- Q Now, that money was turned into the Police Property Clerk, is that correct?
 - A That's correct.
 - Q And that was turned in by you?
- A I made vouchers. It was transported I believe by other officers.
- Q Were you the one that actually physically counted the money?
- A No, there were quito a fow officers counting it, superior officers and what not.
- Q Now, a few moments ago I asked you if you were questioned in the federal grand jury about certain matters.
 - A That's correct.
- Q In that federal grand jury wore you questioned with respect to the seizure of currency?
- A I don't believe I was. If I was, I did invoke my constitutional privileges.
- Q Now I ask you at this time, Officer Bonino, did you seize any money on May 21, 1371 that was not reported to the Police Property Clerk?

MR. MOSLEY: I object.

THE COURT: Overruled. I will take it.

THE WITNESS: At this time your Honor, may I confer with my counsel?

THE COURT: Yes.

(The witness then conformed in private with Mr. Washor.)

MR. DILLER: May the record reflect that the witness conferred with councel.

THE COURT: Yes.

THE WITNESS: Your Monor, after conferring with my attorney, at this time I wish to invoke my constitut onal privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs soised in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSIEY: I object, your Honor.

THE COURT: Overruled.

THE KITNESS: May I confor with my counsel?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

THE WITNESS: Your Took, after conferring with my attorney, at this that I wish to invoke my constitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs solmed in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, your Honor.

THE COURT: Overruled.

THE WITHESS: May I confor with my counsel,

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

MR. DILIER: Will the record reflect that the witness had an opportunity and did in fact confer with counsel, your Honor.

THE COURT: Let the record so indicate.

THE WITNESS: Your Honor, after conferring with counsel, I again invoke my constitutional privileges and refuse to answer that question.

Q Officer Bonino, again directing your attention

to May 21, 1971, was there jewelry seized from the Sims' home which you did not report to Police Property Clerk?

THE WITNESS: Again, your Monor, after conferring with my attorney, I invoke my constitutional rights and refuse to answer this question.

- q In connection with monies seized at the Sims' home on May 21, 1971, were you together with a brother officer at that time?
 - A Yes, I was.
 - Q And who was the brother officer?
- A I believe it was Patrolman Henry, I believe it
- Q And was he with you present when the money was taken from the house?
 - A Yes.
 - Q And was Patrolman Fratello present?
 - A At the Sims' residence?
 - Q Yes.
 - A No, he was not.
- Q Was Patrolman Fratello with you at the Cameron residence?
 - A Yes, he was. your 'to

Q With respect to the Campron residence, again on May 21, 1971, was there any money taken from that house that were not reported to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with counsel, I wish to invoke my constitutional privileges and not answer this question.

THE COURT: Officer, do your records indicate the total amount of drugs that were seized and turned over to the Property Clerk?

THE WITNESS: Yes, your Konor, I have my lab

THE COURT: Can you tell me what that indicates.

THE WITNESS: Well, I have here three plastic

bags, one paper bag, one bottle, equalling 5 pounds,

3-11/64th ounces heroin present in each;

Two metal containers, heroin present in each;

6,785 envelopes, between 2 plus 14 ounces,

plus 95 grains, total weight of contents, and three
grains per envelope; 15 envelopes tested, 45 grains
heroin present in each;

1 plastic bag, 4 paper bags, one bottle, one coffee can, one plaster case, including 1 pound

plus 14 and 64th ounces, including weight of paper bags. No dangerous drugs prosont.

One can of dextrose, hydrochloride Merck and one bottle of quinine hydrochloride. No dangerous drug present in each. Each half full.

One large bag, 20-1/2 pounds, no dangerous drugs present.

Five playing cards.

On the second police lab voucher:

Two strainers, one large spoon, two sifters, 18 measuring spoons and one scale. Heroin present on each.

Those are the two lab analysis reports, your

THE COURT: All right, continue.

BY MR. DILLER: (Continuing)

Q And all of that was reported in a return on the warrant, 1; that correct?

A Excuse me?

Q All what you had just read to the Court had been previously reported on a return of the warrant?

A Yes, property vouchers were made up.

Q Now, in addition to that, was there any other

herein or suspected herein taken that was not reported?

"THE WITNESS: On this question, again, your Honor, after conferring with counsel, I wish to invoke my constitutional privileges and not answer this question.

Again directing your attention on May 21, 1971 at the Cameron home, were there any monies seized at the Cameron home that were reported to the Police Department?

- A Yes, there was.
- Q How much was that?

A I don't know offhand. It was all combined. I believe it was approximately \$4,000.

In addition to the \$4,000 that you believe was seized from the Cameron home, was there any additional money that was not reported to the Police Department?

THE WITNESS: Again, your Honor, on the advice of counsel, at this time I wish to invoke my constitutional privileges and not answer this question.

Q Now, in addition to the heroin contraband and the money, was there any jewelry seized at the Cameron home that was not reported to the Police Department?

THE WITNESS: Your Honor, again after conferring with counsel, at this time I wish to invoke my

constitutional privilege and not answer this question.

Q Now, when you appeared before the federal grand jury, were you asked questions relating to what I just asked you?

A I don't believe I was. And if I was, I did invoke my constitutional privileges.

Q Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.

A As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges.

oall a recess, Judge, and we will have to confer in chambers. I think it is appropriate. Unless your Honor feels differently.

THE COURT: Yes, all counsel come into chambers.

(Recess)

(Hearing resumed. Alliparties present.)

BY MR. DILLER: (Continuing)

- an affidavit for a search warrant, is that correct?
 - A That is correct.
- Q And did you personally prepare this affidavit or did someone prepare it on your behalf?
 - A Another officer typod it up.
 - Q Did you dictate the contents of the affidavit?
- A I believe I gave him a sheet of paper more or less with my observations and typed it in from there.
- Q Whatever happened to that sheet of paper, do you have that?
 - A No, I don't believe I do. .
- Q Did anyone dictate to this officer that was typing anything that went into the affidavit which you subsequently signed?

THE COURT: You mean did anyone else?

MR. DILLER: Other than Patrolman Bonino, yes.

- A No, not that I know of.
- Q Was anyone present when you dictated this affidavit to the officer?
 - A I really don't remember.
 - Q Have you seen the affidavit recently?

A Just briefly the other day I glanced at it.

MR. DILLER: At this time, with the Court's

permission, I will ask that the affidavit for the
search warrant signed by Patrolman Bonino be deemed

marked in evidence.

MR. MOSLEY: No objection.

THE COURT: That will be deemed Defendant's Exhibit C in evidence.

applied for a search warrant in this case was so as to be able to get into the Sims' home and the Cameron home for the purposes of seeing money?

A The purpose of my affidavit here was a policy operation.

Q Did you have in your mind when you prepared this affidavit that the purpose was to get into the Sims' home so that you could get some cash money which you believe was available?

MR. MOSLEY: I object to what was in his mind, your Honor.

THE COURT: Overruled.

A The purpose of my affidavits, my warrant was for a policy operation.

- Q And what did you intend finding in the Sims' home when you prepared the affidavit for the search warrant?
 - A Excuse me?
- Q What did you expect to get in the Sims' house after you prepared the search warrant?
 - A Policy records.
- Q Did you intend at that time to be able to seize any cash money?
- A All I knew of my affidavit was for policy and other gambling paraphernalia.
- Q Now, on May 18, 1971 you stated in the affidavit that you made certain observations, is that correct?
 - A That's correct.
- Q When you were making these observations, did you make any notes in connection with what you say you observed?
- A I may have made some notes just quick like that on a piece of paper. Offhand, I don't remember though.
- on which you made those notes?

A If I did make it, I'm sure I may have thrown it away after that. I really don't know. I may have kept it for a few days.

Q Are those notes that you made on a little piece of paper ever subsequently recorded by you in a memo book?

A My memo book, I believe you have it or the D. A. has the memo book.

Q My question is, after you made the notations did you subsequently put it --

A You mean to put all the observations in my

Q Yes.

A I don't believe I did.

When you make observations, especially in connection with an application for a search warrant, to have that placed in your memorandum book?

MR. MOSLEY: Objection, your Honor.

THE COURT: Overruled. I will take it.

A I believe, if I can refresh my memory with my memo book, I believe I have myself in the area during the times regarding the search warrant observations. Q In addition to having yourself in the area, do you have in the memo book the specific observations that you made that subsequently appears in Defendant's Exhibit C?

THE COURT: Do you have to look at the memo book to refresh your recollection?

THE WITNESS: Offhand, I would have to say no because I really don't remember. I would have to refresh my recollection.

THE COURT: Do you have the memorandum book?

MR. DILLER: I don't have it, your Honor.

THE COURT: The witness says somebody has it.

THE WITNESS: I checked the photostatic copy.

- Q I have a photostatic copy but the photostatic copy I have commences with the 19th.
- A Excuse me, that was the copy that was taken from the D. A.'s folder the other day?
 - Q That's right, that is the 19th.
 - A May I see it?
 - Q Yes (handing to witness).
- A Yes, this here one only goes from the 19th, I believe, to the 24th, May 24th.

THE COURT: "What would be in your memo book?

THE WITNESS: The 18th. I don't have it any more.

MR. DILLER: At this time, I ask that this photostatic copy, which is the only thing I have, be marked as Defendant's Exhibit D for identification.

(The item referred to was so marked.)

q I ask you to look at Defendant's Exhibit D
for identification, Officer Bonino, and ask you if that
in any way refreshes your recollection as to what your
memo book contained on the 18th, the day before if that
in any way assists you in remembering what you put down
in your memo book on the 18th, if anything?

A I really can't say as long as the sheet is not here.

q For these purposes now, I will direct your attention to the 19th since that is what you now have in front of you. On the 19th of May in your affidavit you stated you made certain observations, is that correct?

A That's correct.

Q During the time you made those observations, did you report them on either a picco of paper or in your memo book?

- A Not in my memo book.
- Q Do you recall putting them on a piece of paper?
- A I may have.
- Q When you dictated to Ciricor Honry, did you --
- A Excuse me, let me clarify that, I did not dictate to Officer Henry.
 - Q To whom did you dictate it?
 - A To one of the clerical officers.
- to, did you have a piece of paper in front of you that you were reading or was it out of your memory?
- A I had some sort of slip of paper which had times and more or less the observation what I had seen quickly. In other words, it may have been such and such a date, 11:15 to 12, whatever it may have been, three persons, in, out, and whatever it may have been.
- Q Now, was that observation which you are now reciting subsequently placed in your memorandum book on the 19th?
 - A That observation was just an example what I just gave you.
 - Q I understand, but any observations you made on the 19th, were they subsequently put in your memorandum

book?

- No, just that I was in the vicinity from the hours on my affidavit.
- o would you please read to us just what you put in your book with respect to the 19th.
- A 1115 hours to approximately 1545 hours, vicinity of Linden and 197th and Farmers and New York regarding search warrant observation.
- Q Is there anything else in connection with any observation on the 19th that you placed in your memorandum book?
 - A You mean pertinent to this case?
 - Q Yes.
 - A No, there is not.
- Q Isn't it a fact, Officer, that in connection with the normal course of your duties you are obligated by police regulations to make such entries in your memorandum book?
- A I don't believe I ever actually put full observations down. It's in my memo book.
- mean by observation. Again, I am directing your attention to the 19th. In the last few sentences of page 1 of the

Affidavit for the Search Warrant, I believe it's

Defendant's Exhibit C, states that on Wednesday, May 19,

1971, at 1115 hours I went to Stanley Sims' residence

and approximately 1125 hours Stanley Sims departed from

his residence, walked to the curb of the above, where

a 1970 Plymouth was parked. The same unknown male

negro was seated behind the wheel of said vehicle, and

so forth.

Do you see what I am reading from?

- A Yes.
- Q Those are the observations I have reference
 to. The question I am now asking of you, as far as
 you know, were you obligated to place those observations
 in your memorandum book consistent with the policy of
 the Department?

MR. MOSLEY: I object to the last phrase, "Gonalstent with the policy of the Department."

THE COURT: Sustained.

- Q Were you obligated to place those entries in your memorandum book?
- A I really don't know. I imagine I was. I'm not sure. I really don't know.
 - Q Did there come a time when you showed your

memorandum book to any superior officer for signature?

- A Yes.
- Q And did you discuss with him at that time your failure to make specific entries?

MR. MOSLEY: I object, your Honor.

THE COURT: Sustained.

MR. DILLER: I withdraw that question as an improper question.

Now, do you know what you did with the piece of paper upon which you said you made certain entries for the 19th?

A No, I do not.

Q Do you know if that ever became part of a UF-61, that piece of paper? Did you ever transcribe it to a UF-61?

A No.

MR. MOSIEY: Now which question is this?

THE COURT: Did he ever transcribe those notes
on a piece of paper from the observations of May

19th, onto a UF-61. Is that the question?

MR. DILLER: Yes, your Honor.

- A No. I don't know. Math him at
- Q Is there any memorandum anywhere which we can

geet, your Ho

see with respect to the reporting of the observations you made on May 19th that you have in this affidavit?

A That I really don't know.

Q Now, let us go back to the 18th. Do you have in front of you, Officer Bonino, the affidavit for the search warrant?

A Yes.

Now, in the very first paragraph it says,

"On Tuesday, May 18, 1971 at about 1110 hours, while
on patrol and in the area of my assigned location

I did observe Stanley Sims, a known gambler to me, to
be involved in illegal policy operations leaving his
residence, 197-01 116th Avenue, St. Albans, New York,
and enter a 1970 Plymouth, license number so and so.

"Seated behind the wheel of the Plymouth was an unknown
male negro."

when you made those observations, where were you in relation to Stanley Sims, when you made those observations for the first time?

A I was parked in the vicinity of his residence.

Exactly where, we went over this the other day, counselor.

I couldn't tell you which corner because we changed the observation point each day.

- Q I am talking with respect to the 18th.
- A Right, to the 18th.
- Q Did you ever make any notes as to where you were seated?
 - A No.
 - Q Do you know where Stanley Sims' house is?
 - A It's a corner house.
- Q And could you tell us the entrance from the side street as well as the main street?
- A It depends which way you are sitting on the side street and which side street you are on.
- Q Do you know what side street abounds Stanley Sims' residence?
 - A .Offhand, I don't know.
- Q I will show you Defendant's Exhibit A and ask you --

THE COURT: It is A for identification.

- Q --A for identification, and ask you if that is a fair depiction of the entry into the sims' home.
 - A It seems like it. It looks similar to it. .
 - Q Now, looking at that photograph -THE COURT: Are you offering it now, counsel?
 MR. DILLER: I will offer the photograph in

evidence.

(The item referred to was handed to Mr. Mosley.)

THE COURT: Any objection?

MR. MOSLEY: No, your Honor, with the Officer's qualifying answer that it looks like it.

THE COURT: All right, received in evidence.

(Defendant's Exhibit A for identification was received and marked in evidence.)

THE COURT: At this time we will recess for lunch and return at 2 p.m. Bail is continued on the defendants.

(Luncheon recess)

AFTERNOON SESSION

(Hearing resumed. Present: The Defendants; Howard J. Diller, attorney for the defendants; William S. Leahy and Brent Blacksburg, Assistants District Attorney.)

LUCIDO BONINO, resumed:

THE CLERK: You are reminded you are still under oath, Mr. Bonino.

THE COURT: Continue, Mr. Diller.

BY MR. DILLER:

- Q Do you know what street the Sims' residence
 - A May I?
 - Q Yes, look at your notes.
 - A The address is 197-01 116th Avenue.
- Q That would make the house, would it not, Officer, on the corner of 116th Avenue and 197th Street?
- A That would probably be between 197th and 198th or 197th and 196th, I'm not sure..
- Q Do you know if it is on the south side or north side of the street, do you remember that at all?
 - A No, I don't.
- Q Do you recall if you were in different positions at the time of your observations on the 18th of May or did you have a fixed position?
- A On the 18th of May I believe we were parked in the auto observing the house, the residence.
- Q Where was the auto in which you were parked in relation to the house, was it across the street, was it.
 - A I don't remember. . . .
 - Q And did you have occasion to move the automobile

at any time on the 18th?

- A Yes.
- Q And for the first time when did you move the automobile?
- waiting for him and proceeded on.
 - Q And you followed that vehicle, did you?
 - A Yes, we did.
- Q And that went to the Cameron house, is that right?
 - A That's correct.
- Q I show you what has previously been marked as Defendant's Exhibit B for identification and ask you if that fairly depicts the Cameron residence?
- A It looks like it, yes, it looks something like it.

MR. DILLER: At this time, I would respectfully offer Defendant's Exhibit B previously marked for identification into evidence.

THE COURT: That is a fair facsimile of the situation as it looked like at that time?

THE WITNESS: Pretty much so.

THE COURT: Received in evidence.

MR. LEAHY: No objection.

- Q. Do you recall where you were parked taking up an observation post with respect to the Cameron residence?
 - A Yes.
 - Q And where were you parked?
- A We were parked in the parking lot of a supermarket which is directly across the street from the Cameron residence.
- Q And in terms of distance, could you just briefly, if you could recall, tell us how far it was?
- A What's the length of this courtroom? Maybe about the length of this courtroom, which is what, about 100 feet or so?
- Q Did you take a fixed location or did you move around during your observation period?
- A On that day we were there first with the auto, with an auto, and then we got an observation truck and we had that also parked in the lot.
- Q Were you in the observation truck or were you in the autof
 - A I was in the auto at the beginning. My partner

with majort to the Calary

- Q Did he leave you behind in the lot?
- A He left me behind in the lot.
- Q During the time you were in the lot as your partner went and got the truck, did you observe Stanley Sims enter the Cameron residence?
 - A We observed him right at the beginning.
- Q You were both together when you made that observation?
 - A Right.
- Q Did he enter that residence alone or was there someone else with him?
 - A There was someone else with him.
 - Q Was that the driver of the 1970 Plymouth?
 - A Of the vehicle, yes.
 - Q Did they both remain inside? ..
 - A' Yes, they did.
 - Q And for how long did they remain inside?
 - A Approximately two hours.
- . Q By the way, this 1970 Plymouth, did it have any markings, that of a private taxicab?

- A No, 1t did not.
- Q It had no markings --.

THE COURT: Is there any question as to whether.

there is any perjurious statements in this affidavit?

Why read it into the record? Put it in evidence and

if you have anything to contradict it produce it.

MR. DILLER: I have to ask questions. Otherwise, I cannot get the contradiction of statements.

THE COURT: What do you want him to do, contradict the statements he made in the affidavit and every time you ask him a question he looks at the affidavit to answer you? So why don't we just read the affidavit. Mark it in evidence. If you have some evidence that is going to contradict it, introduce it and ask him whether it's the truth, whether it's his signature. I think that is the way to handle it, instead of going all the way through the affidavit piecemeal.

MR. DILLER: There are special questions I want to ask with specific reference to the affidavit.

THE COURT: I wish you would get to them.

Q Did you observe anyone on the 18th enter the Cameron residence during the period of time that you had the residence under observation?

- A Yes.
- Q Who did you observe?
- A I observed Stanley Sims, this other male negro who was the driver of the auto, who was later identified as one Oscar Thomas, and several other males.
- Q Did you determine the identification of these several other males?
 - A No, I did not.
- Q Did you ever make any notes or reports as to what these males looked like?
 - A Just little scratches.

THE COURT: Unidentified, is that what they were?

THE WITNESS: Yes.

THE COURT: You tried burglary cases before, you know what they are, unidentified males.

- Q No effort to identify them, is that correct?
- A That's correct.
- Q Now, during the period of time that you are speaking of, did you see any policy slips?
 - A No.
 - Q Did you hear anyone discuss any bets?
 - A No, I did not.

Q. Were you told anything about policy from anyone that you were talking with at that time?

A No.

MR. LEAHY: I object to the form of that question.

THE COURT: I will overrule the objection.

THE COURT: Did you have a confidential informant?

THE WITNESS: No, your Honor.

- Q There came a time that Sime left the Cameron residence, is that correct?
 - A That's correct.
 - Q And he went back to his own residence, did he?
 - A That's correct.
 - Q With Oscar Thomas?
 - A That's correct.
 - Q And when he entered the residence, approximately what time was that?
 - A At approximately five to 3 or so.
 - Q And you say you observed unknown males present certain envelopes to him, is that correct?
 - A During the next -- Dout police
 - Q And that was from 2:55 to 3:30?
 - A That's correct.
 - Q And, again, you didn't see any policy slips

a systate the start will

and heard no bets?

- A That's correct.
- Q And never identified the unknown males?
- A That's correct.
- Q Now, as an expert in policy, what race is the policy based on?
- A It depends. Under the new way or the old way?

 Do you go by the total mutual?
- Q What is the race normally that the policy is based on?
 - A It depends on the track mainly.
- Q On May 15 and May 18, 1971 what track was running?
 - A I really don't know offhand.
- Q Isn't it a fact that the policy is based on the numbers in the third race from your experience?
- A If they're going for the full number. If it's the old way it's the third, fifth and seventh races.

THE COURT: These bets or alleged observations were made after the race was over?

THE WITNESS: Yes.

THE COURT: Couldn't there be bets on the following day?

THE WITNESS: For policy? There could be if weekly work or it could be previous work being dropped off worked over, that has already been worked.

THE COURT: In other words, it didn't have to be definite bets?

THE WITNESS: It didn't have to be definite bets.

- Q: Do you know what were in those envelopes that was presented?
 - A No, I did not.
- Q Was there anything special about the envelopes?
 - A No, I seen them many times in policy operations.
- Q Did you ever see those kind of envelopes used in non-policy operations?
 - A I may have.
- Q They are readily obtainable in any kind of store?
 - A I believe so.
- Q When the envelope was handed to Stanley Sims,
- A By the doorway. Up to the front of the door.

 In other words, the door would open and he was in front

of the docrway.

- a And you could look right at him?
- A Yes.
- A His back was to you, wasn't it?
- A His back or his side, I don't know.
- And did that person receive any money of any kind at that time?
 - A Not that I know of, no.
- And was it always Stanley Sims that opened the door or was it a female that sometimes opened the door?
 - A No, just Stanley Sims.
- Q Did you observe any females entering either the Cameron residence or the Sims' residence during this period of observation?
 - A You are speaking of when, which day?
 - Q On the 18th.
- A. I'm not sure. I believe the Cameron residence,
 Mrs. Cameron. I am not positive though because I had
 seen her at various times in and out of her residence.
- of the residence, who the person was?

And did that person receive any

- A No, just that it was a female.
- Q Was it one female or more than one female, if

side, I don't

you can recall?

- A I believe it was just the one.
- Q With respect to the 19th, everything you said with respect to the 18th was true as to the 19th, is that correct?
- A Just the times I believe were slightly different.

 Yes, the times are slightly different.
 - on the 19th did you see any policy slips?
 - A Just the same envelopes.
 - p Did you hear about any bets?
 - A No, I did not.
- Q Did anyone give you any information with respect to any policy?
 - A No, they did not.
- Q Was there anything unique about any of the envelopes you say you observed?
 - A No, just my brief testimony, that's all.
- And with respect to the 19th, you kept Stanley Sims under observation from 11:45 to 1500, is that correct, 3 o'clock on the 19th?
- A They were in the house. In other words, they entered the house -- they left their residence and went to the house of the Cameron residence and then repeated

the procedure from the day before. In other words, they left and went back to the Sims' residence.

- And you also observed envelopes being handed to Sims after 2 o'clock on the 19th?
 - A That's correct.
- Q And would you say that after 2 o'clockwould be approximately after or about the time of the third race?
 - A I really don't know, counselor.
- Q Do you know what time the third race at Belmont would be run?

MR. LEAHY: Objection, your Honor. The officer just testified he didn't know the time.

THE COURT: Overruled.

- A No, I don't.
- Q Officer, did you procure as a result of this affidavit a search warrant for the Stanley Sims' residence?
 - A Yes, I did.
- n Did you also procure a search warrant for the Marvin Cameron residence?
- A It was one search warrant with both addresses on, both residences, and also for the auto, the 1970 green Plymouth.
 - Q Is it your testimony that Oscar Thomas, the

way that after

driver of the 1970 Plymouth, remained with Stanley Sims the entire period of time of your observation?

A That's correct.

MR. LEAHY: If your Honor please, even though the officer hasn't answered the question, can we have what day we are talking about?

MR. DILLER: The 18th and the 19th.

THE WITNESS: That's correct.

- Q Everything that happened on the 18th happened on the 19th?
- A As I say, just that the times were slightly different.

THE COURT: May I see the affidavit? I think we ought to have it marked in evidence without having it deemed marked.

Where is the original affidavit?

MR. DILLER: It should be in the court file.

MR. LEAHY: I don't have the original, Judge.

It may be in the court file. I am not aware if it
is or not. This is a copy which was apparently used
for the purpose of the appeal.

THE COURT: Let us get the original. That is the one that is in question.

somered the qui

talking about?

THE CLERK: I will have to find out from Kew

Gardens whether they had it over there. This case
is three years old. Everything should be in there.

This was in the Appellate Division.

THE COURT: You mean to tell me the affidavit didn't go up with the court papers?

MR. DILLER: It was part of our appendix that we put in originally.

MR. LEAHY: Judge, there should be something . remitted, I believe.

THE CLERK: This is the original appellant's brief --

MR. DILLER: It is page 12 of appellant's brief.

MR. LEAHY: Judge, I believe counsel for the defendant and the People will stipulate that page 12 is an accurate copy of the original search warrant, the affidavit and the search warrant, and that is what is before the Appellate Division.

THE COURT: Page 12, 13 and 14, is that correct?

MR. DILLER: That's correct.

THE COURT: And this is in your appellant's brief and index, is that correct?

With the court paper.

With Course: ! You mean to tell an

MR. DILLER: That's correct.

THE COURT: And you both stipulate that that is Defendant's C?

MR. DILLER: That is correct.

MR. LEAHY: Yes, your Honor, the People so stipulate.

THE COURT: Officer, I show you Defendant's Exhibit C and ask you, is that the affidavit you prepared when you made the application for the search warrant?

THE WITNESS: Yes, I believe it is.

THE COURT: After you prepared it you read 't,
I presume, is that correct?

THE WITNESS: That's correct.

THE COURT: Did you sign it?

THE WITNESS: Yes, I did.

THE COURT: Did you then subsequently appear before a Criminal Court justice?

THE WITNESS: Yes.

THE COURT: And did you make an application for

THE WITNESS: Yes.

THE COURT: Do you recall who the Criminal Court

Y. V. . , your Honor, v

judge was?

THE WITNESS: Judge Tsoucalas.

THE COURT: And at that time did you swear before him to the truth of the statements contained in that affidavit?

THE WITNESS: I did.

THE COURT: No further questions by the Court.

Do you have any questions?

MR. LEAHY: No, your Honor.

MR. DILLER: I have no questions.

THE COURT: I think we ought to physically mark pages 12, 13 and 14, which is stipulated to be the affidavit that the officer signed and swore to in making application for the search warrant in question.

(The item referred to was then marked Defendant's Exhibit C in evidence.)

(Witness excused)

MR. DILLER: Defendant calls Henry Schnitzer.

THE COURT: Do you wish the officer to remain?

MR. DILLER: As far as I am concerned, the . officer is finished.

THE COURT: Do you have another officer you wish to call?

MR. DILLER: I do, but I am not going to call him.

THE COURT: Then Mr. Washor can leave.

MR. DILLER: Unless the District Attorney wants

MR. LEAHY: No, not today.

York, N. Y., called as a witness by the defendants herein, having been first duly sworm, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. DILLER:

- Mr. Schnitzer, you are a practicing attorney and a member of the Bar of the State of New York, are you,
 - A Yes, I am.
- Q For how long have you been a member of the New York Bar?
 - A Over 30 years.
- Q . And in the early part of your career were you a member of the New York City Police Department?

Wir No, not today.

- A I was.
- a And for how long were you amember of the New

York Police Department?

- A About six and a half years.
- And during this period of time were you ever attached to the plainclothes division?
 - A I was.
 - g For how long a period of time?
 - A Albut five and a half years.
 - Q Where did you work when you were plainclothes?
- I worked in a division office called the Fourth
 Division, which is on the east side of Manhattan. I
 worked in Borough Headquarters Manhattan East and I
 worked on the Police Commissioner's Confidential Squad.
- A Have you ever been sworn in as an expert to testify in cases involving policy?
 - A Yes, I have.
- And would you approximate to how many occasions that had occurred?
- A Well, it had to be several hundred times at least.
- Q And you have testified in various courts even outside of the City of New York?
 - A Yes, I have. I was sent up to Schenectady by

the Police Commissioner, at the time Howard Wallender, and I also testified in federal court only about a year ago.

- O And over the period of years that you have been practicing law have you represented clients in policy cases?
 - A I have.
- And could you approximate for us how many policy cases you had?
- A I would say in over 20 years probably more than 2,000.

MR. DILLER: With the Court's permission, I would ask that this witness be deemed an expert in policy.

MR. LEAHY: Your Honor, I have no objection to conceding the qualifications, and I do concede the qualifications of the expert, but I would ask the Court if we could approach the Bench to find out where this line of testimony is going to get us.

THE COURT: I will take it subject to connection.

You can move to strike it.

On the stipulation of the District Attorney,
we will take the witness to be an expert on policy.
When you say "policy," what are you talking

about, all branches of policy?

MR. DILLER: All branches of policy.

- Mr. Schnitzer, what are policy based on basically?
- are run, and the New York policy is run on the tracks in New York, when the New York tracks are running, and usually there is one track, that is the flat tracks. We also have trotter tracks, of course. So that when you get the results of the races, that is the horses finishing in the order of win, place and show, you add those up. And when you add the totals of the first three races, you take the number to the left of the decimal point, that is the first number of the policy number that's going -- the policy number of that day.
- A Now, is that at the conclusion of a certain race?
- A That's at the conclusion of the third race you'll get the first number.

MR. LEAHY: At this time, I'm going to object to this line of questioning. The hearing is on the basis of perjured testimony allegedly in an affidavit which has already been characterized and found by the Appellate Division to be sufficient

w yor solicy is run on

n the New Work tracks are run

to sustain the search warrant if it was not based on perjured allegations.

THE COURT: What is the purpose of this line of questioning?

MR. DILLER: The purpose of this line of questioning, that this witness will testify that it is contrary for procedures for people who handle policy slips after the conclusion of the third race, the race in which policy comes out, and therefore a statement that observations were made was a perjurious one, which indeed never happens.

MR. LEAHY: If your Honor please, we are confined to a particular date and I don't think the
witness is prepared to say that he knows what
operation was on by the defendants, whether he was
using New York tracks or other tracks.

THE COURT: Or what was in the slips when they got there.

MR. DILLER: I submit that Mr. Leahy has an opportunity to cross-examine this witness.

THE COURT: Ask him the question then.

0 Mr. Schnitzer, does anyone put in policy bets after the third race? A No.

THE COURT: Nobody at all?

THE WITNESS: Nobody at all. And I can explain the reason why. Usually the collectors will insist that the controllers and the bankers will insist that the numbers come in before 2 o'clock, mostly between 1:20 and 2, for this reason: they have to have time to get it over to the controller. Then the controller has to have time to get it over to the banker. If you add that time on, if it goes after the third race, even one fraction of a minute after the third race, they could already get the first number and have an advantage in a bet and a very big advantage.

THE COURT: It is 10 after 3 now. Assuming the horses were running at the New York track. If I got a policy man and I gave him \$5 and I said I want number 275 from Monday to Friday of next week, he wouldn't take the bet?

THE WITNESS: He wouldn't take the bet.

THE COURT: Then he wouldn't get my business.

All right, go ahead.

Are there any kind of special envelopes in the

policy business?

A They can take -- the envelope doesn't make any difference.

THE COURT: For the record, I really don't bet but I find the witness's testimony incredible.

- There is no special type envelope, you say, used?
 - A No.
- Q Now, was it your procedure when you were a plainclothesman making observations to record your observations on an envelope?

MP. LEAHY: Objection. I don't think the Court should be interested in this officer's procedure.

THE COURT: Sustained.

Would it be an unusual thing that in two
successive days the same number of persons would be
placing policy slips with a collector?

MR. LEAHY: Object to the form of the question.

THE COURT: Sustained.

MR. DILLER: I have no further questions.

withous testimony

MR. LEAHY: I have no questions.

THE COURT: You are excused.

a is no special type env

(Witness excused)

THE COURT: Call your next witness.

MR. DILLER: Defense calls as its next witness Edith Cameron.

herein, residing at 145-40 New York Boulevard,

Springfield Gardens, New York, called as a witness
on her own behalf, having been first duly sworn, was
examined and testified, as follows:

DIRECT EXAMINATION

BY MR. DILLER:

- Q Mrs. Cameron, were you present in court during the testimony this afternoon of Patrolman Bonino?
 - A Yes, I was.
- Did you hear Patrolman Bonino testify that on May 18, 1971 he observed several males enter your home at 145-40 New York Boulevard, Jamaica, New York, between a period of time of 11:30 in the morning until 2:30 in the afternoon on the 18th of May, did you hear him so testify?
 - A Yes. greet Cast your next with
- Q Were there any persons that entered your home during that period of time?

Freday religions at 145-40 New York

ON , one

- A Just one, Stanley Sims.
- Jus Stanley Sims?
- A Right.
- Q When Stanley Sims entered, dil he enter with anyone else?
 - A No, alone.
- a Do you know a person by the name of Oscar Thomas?
 - A Yes.
- And did Oscar Thomas enter the premises, your home, with Stanley Sims?
 - A No.
- Were there any other persons that entered during
 that period of time other than Stanley Sims?
 - A No.
 - Q Who was home at that time, if you can recall?
- A My husband and myself and then Stanley Sims came in.
- Q Do you recall how long Stanley Sims remained in the house?
 - A It was until the evening.
- And from the time that he entered until the evening, did anybody come to your home?

- A Yes, the rest of the defendants.
- a And this was on the 18th?
- A Right.
- Now, directing your attention to the 19th, the following day, did you hear Patrolman Bonino testify that approximately five or six men came to your home during that period of time?
 - A Yes.
 - And did anyone come to your home on the 19th?
 - A Yes, they did.
 - Q Who came?
 - A Mr. Williams and Mr. Davis.
- Ω Did anyone ring the bell during that period of time other than those persons?
 - A No.
 - MR. LEAHY: Objection.
 - A. I do.

 THE COURT: Overruled. I will take it.
- Q And did Oscar Thomas stay at any time in your home on the 19th of May?
 - A No.

 (\cdot)

MR. DILLER: I have no further questions.

or off men came to y

THE COURT: Any questions?

CROSS-EXAMINATION

BY MR. LEAHY:

o Mrs. Cameron, isn't it a fact that you pleaded guilty to the crime of criminal possession of gambling records in the second degree in the case that is on trial, in the case which is before the Appellate Division which is the subject of this trial?

A Yes, I did.

MR. LEAHY: That is all.

MR. DILLER: No further questions of this witness.

(Witness excused)

MR. DILLER: Defense calls Juanita Sims.

JUANITA SIMS, one of the defendants
herein, residing at 197-01 116th Avenue, St.
Albans, New York, having been first duly sworn,
was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. DILLER:

Mrs. Sims, were you present in court during the time that Patrolman Bonino testified?

A I was.

- And did you hear Patrolman Bonino testify that he observed your residence on May 18, 1971 from 2:55 in the afternoon until 3:30 in the afternoon?
 - A Yes.
- people, unknown persons, came to your house and knocked on the door?
 - A. I heard him.
- Q Did any persons come to your home on May 18,
 - A No.
 - Q Who was in your house at that time?
 - A. Probably me by myself.
 - And did anyone at all come to your house?
- A I never have nobody come to my house. It would be a pleasure if somebody would knock at the door.
- Q Did you hear Patrolman Bonino testify that on the 19th of May persons came to your house at approximately the same time in the afternoon?
 - A I heard him. ratwolman noneco.
 - And did anyone come to your house on that day?

 - Q was your husband home on those two days?

book him also testify

son, cand to your no

- A Probably. He's home all the time to me.
- And do you know if he answered the door in your presence?
- A I usually have dogs so I usually answer the door myself all the time.

MR. DILLER: No further questions.

MR. LEAHY: I have just one question.

CROSS-EXAMINATION

BY MR. LEAHY:

- Mrs. Sims, will you tell the Court if it is a fact that you pleaded guilty in this proceeding to criminal possession of gambling records in the Sixth Degree?
 - A I did.
- Q Do you recall what statement you made to the Court when you pleaded guilty?
 - I said I was guilty.

MR. LEAHY: No further questions.

MR. DILLER: I have no further questions.

(Witness excused)

THE COURT: Next witness.

MR. DILLER: That is the defendants' motion, your Honor. The defense has no further witnesses.

The defense at this time would ask leave of the Court for the opportunity to prepare a full and complete memorandum of law in connection with the matters pending before your Honor.

THE COURT: You are resting?

MR. DILLER: I am resting.

THE COURT: Mr. Leahy?

MR. LEAHY: Your Honor, I didn't expect that the hearing would be concluded this early. I am going to ask your Honor to recess the hearing until a date next week. I have a witness I would like to call.

THE COURT: When can that witness be here, do you know?

MR. LEAHY: No, I don't, Judge.

THE COURT: Why can't we recess until tomorrow?

MR. LEAHY: I wouldn't be able to get him in tomorrow.

MR. DILLER: If it is going to be next week -MR. LEAHY: Forget it, Judge. The People will
rest at this point. I won't call any witnesses so
as to expedite the proceeding.

THE COURT: I don't want you to expedite the

re resting?

resting

proceeding. If you feel you can get a witness here,
I will recess the hearing. What date are you available next week, counselor?

MR. DILLER: The 13th, and I think by that time I can even have my memorandum.

THE COURT: The 13th is next Wednesday. We will recess until 10 o'clock on June 13th. Whatever I am trying, I will take this first.

MR. LEAHY: The day is fine. I don't think though that briefs should be exchanged until after the hearing. And I would ask that a schedule be set up so that I can be served with the defendant's brief and so that I can answer the defendant's brief.

THE COURT: If he can have his prepared by the 13th, then we will give you time to answer it and that will expedite it.

MR. DILLER: I say the 13th optimistically.

THE COURT: If you need a couple of more days

I will give it to you.

June 13th, 10 a.m. Hearing recessed.

Bail is continued on the defendants.

OPINION BELOW

WILLIAM C. BRENNAN, JUSTICE

SUPREME COURT, QUEENS COUNTY CRIMINAL TERM, PART XII

THE PEOPLE OF THE STATE OF NEW YORK

BY WILLIAM C. BRENNAN, J.

-against-

and

DATED August 14, 1973

JENNIE SIMS

Ind. No. 2116/71 (Sime)

Ind. No. 2116/71 (Sims) 2115/71 (Cameron

et al)

EDITH CAMERON, et al.

Defendants.

On appeal from six judgments of this Court all rendered May 15, 1972 (one as to each defendant) convicting them of criminal possession of a dangerous drug upon guilty pleas, the Appellate Division rendered its decision on December 29, 1972 (People v. Cameron et al, 40 A D 2d 1034). With respect to two orders of this Court denying successive motions to suppress evidence, the cases were remanded to this Court for hearing and a new determination on defendants' motion to suppress evidence on the grounds that statements contained in the affidavit upon which the search warrants were issued were perjurious.

In question were three search warrants issued and executed on May 21, 1971, upon an affidavit executed by police officer Lucido Bonino which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. On defendants motion to controvert the warrants

and to suppress the evidence seized, the right to a hearing was waived and the motion was argued solely on the grounds of legal sufficiency of the underlying affidavit. The Appellate Division has upheld the finding of a sufficient showing of probable cause to justify the issuance of the warrants.

evidence on the grounds that the affidavit contained perjured cestimony and requesting a hearing on that issue. In support of such motion, defendants' counsel in his affirmation stated, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal grand jury had been convened to inquire into the conduct of the arresting officer in this case, that the officer had refused to testify on the grounds of self-incrimination and that the affidavit upon which the warrants had been issued contained perjured testimony. In opposition, the People stated that the United States Attorney's office had informed them that although the officers involved had been called before the Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied in this Court by order dated January 25, 1972.

In its decision the Appellate Division stated:

"In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attached on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 N Y 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent grand jury proceedings were not conclusively refuted by the People. However tenuous

the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra, p. 186)."

Accordingly, a hearing was held on June 5th, 6th and 7th, 1973. Defendants called as their first witness the police officer who had made and executed the affidavit, Lucido Bonino, Shield No. 5714, a member of the New York Police Department for 10 years, active in plain clothes investigation of gambling activities for about three years. The officer was questioned concerning his activities and observations on May 18, 1971. He said that he knew defendant Stanley Sims from pictures, previous observation and that he had been pointed out by a fellow officer; that he had observed the said defendant go in a Plymouth car to premises 145-50 New York Boulevard, Jamaica, New York, the residence of defendants Cameron. When asked whether he had been subpoenaed before a Federal grand jury to testify in this case the officer answered "No". (Minutes, p. 19) The following exchange ensued:

(By defendants' counsel)

- "Q Did you appear before a federal grand jury in connection with your investigation and duties in connection with the Stanley Sims investigation?
- A That's the federal grand jury you are asking now?
- Q I said the federal grand jury.
- A And this is with my investigation of Stanley Sims?

Q In other words, you work in connection with your, investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest.

THE WITNESS: Your Honor, I request to take the Fifth Amendment on this question."

by Leon Washor, Esq., his own attorney. The Court read the question and answer (Minutes, p. 28) and asked:

"THE COURT: Did you want that question repeated?

MR. WASHOR: I will let counsel conduct his own examination.

MR. MOSLEY: I would object to the form of the question.
It is three questions in one.

THE COURT: At this point then the objection is sustained and the answer is stricken.

Continue, Mr. Diller.

MR. DILLER: I didn't ask any questions.

THE COURT: He is objecting to the last question I just read.

MR. DILLER: There was no objection made at that time, and an objection would be untimely if made at the present time.

THE COURT: I will permit the objection and I will sustain the objection. The answer is stricken. If you wish to reframe the question you may. Let us continue."

After some colloquy, counsel for defendants continued.
(Minutes, p. 30).

"Q" Were you subpoensed to testify before a federal grand jury in connection with Stanley Sims?"

(Further colloquy)

"A I was subpoensed before a federal grand jury. In reference to the Sims case, I would have to say no, not directly.

Q You say 'not directly.' Were there questions asked

Cost nue, Mr. Diller.

of you in that grand jury with respect to your investigation of the Sims case?

A I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges."

Following testimony about the seizure of drugs and money the witness was asked:

- "Q In the federal grand jury were you questioned with respect to the seizure of currency?
- A I don't believe I was. If I was, I did invoke my constitutional privileges.
- Q Now I ask you at this time, Officer Bonino, did you seize any money on May 21, 1971 that was not reported to the Police Property Clerk?

MR. MOSLEY: I object.

THE COURT: Overruled. I will take it.

THE WITNESS: At this time, Your Honor, may I confer with my counsel?.

THE COURT: Yes.

THE WITNESS: Your Honor, after conferring with my attorney, at this time I wish to invoke my constitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, Your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

THE WITNESS: Your Honor, after conferring with my attorney, at this time I wish to invoke my consitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel, your Honor?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

"MR. DILLER: Will the record reflect that the witness had an opportunity and did in fact confer with counsel, your Honor.

THE COURT: Let the record so indicate.

THE WITNESS: Your Honor, after conferring with counsel,
I again invoke my constitutional privileges
and refuse to answer that question.

Q Officer Bonino, again directing your attention to May 21, 1971, was there jewelry seized from the Sims' home which you did not report to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with my attorney, I invoke my constitutional rights and refuse to answer this question.

- Q In connection with monies seized at the Sims' home on May 21, 1971, were you together with a brother officer at that time?
- A Yes, I was.
- Q And who was the brother officer?
- A I believe it was Patrolman Henry, I believe it was.
- Q And was he with you present when the money was taken from the house?

- A Yes.
- Q And was Patrolman Fratello present?
- A At the Sims' residence?
- O Yes.
- A No, he was not.
- Q Was Patrolman Fratello with you at the Cameron residence?
- A Yes, he was.
- Q With respect to the Cameron residence, again on May 21, 1971, was there any money taken from that house that were not reported to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with counsel, I wish to invoke my constitutional privileges and not answer this question."

The witness was further questioned concerning the amount of drugs, cash and other items seized which he answered in detail.

Before discussing the testimony of three additional witnesses produced by the defendants, comment upon defendants' argument is deemed appropriate at this time. The People produced no witnesses.

Guidelines for determination of an attack upon police affidavits in support of application for warrants have been prescribed in People v. Alfinito, supra, cited by the Appellate Division, in remitting the instant case to this Court for hearing.

The thrust of defendants argument is that they have supported the burden, urging the theory that once a police officer availed himself of the privilege of exercising the Fifth

Amendment, it became incumbent upon the People to refute the admission of perjury inherent therein. This conclusion implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. This Court doubts that the men who wrote that privilege into the constitution intended that any person who availed himself of it thereby automatically conceded an admission of perjury. On the contrary, it would appear that by permitting a person to exercise such privilege, they were recognizing his right to protect himself without committing perjury.

However, careful examination of the questions propounded with respect to which the privilege was exercised is necessary to help determine whether the answers thereto, if given, might significantly aid the Court in determination of the truth or falsity of the affidavit made in support of the warrants. The only such question in which reference was made to the affidavit appears on page 41 of the Minutes as follows:

- "Q Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.
- A As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges."

for at thereby

The witness was closely questioned at considerable length concerning the preparation of the affidavit, the reasons for it, the observations of the witness, the facts and circumstances preceding the execution of it, to all of which the

defendant testified freely without once asserting his constitutional rights. From the foregoing, it is obvious that the witness invoked his constitutional rights only when asked about police conduct in connection with the execution of the warrants and not with respect to affidavit preceding it.

Defendants further pointed out that the People saw fit not to call any of Officer Bonino's named partners, one of whom was present during the alleged observations and the other at the time of the arrest, citing People v. Harrington, 70 Misc 2d 303, in which a defendant had accused a named police officer of coercing his confession. In that case the Court granted suppression of the admissions after finding that the defendant had been held in custody without counsel for a week between two interrogations but denied the motion to suppress the use of the gun in evidence, holding further that the owner of the gun was not involved in the allegations of the crime and was available equally to the People and to the defendant, and that in such respect the defendant had failed to meet his burden of proof. As pointed out by the Court with respect to confessions, the burden is on the People to show their admissibility beyond a reasonable doubt (People v. Huntley, 15 N Y 2d 72), whereas in the instant situation the burden is on the defendants. It was the defendants not the People who produced Officer Bonino as a witness. The other officers were known and available

equally to both. A further distinction is that in the instant case there was no uncontradicted evidence to refute. The failure of the People to produce such other witnesses cannot be viewed in the light that their version would controvert any proof previously offered as in the cited case.

Defendants' contention that the witness was evasive and in fact refusing to testify is untenable. An examination of the testimony shows direct answers to all questions relating to observations and activities of the officers and defendants leading up to and including the preparation of the affidavit in the instant case. True, the witness refreshed his recollection from the affidavit but the Court cannot construe that as evasion or reluctance to answer questions. The defendants' counsel is endeavoring to have such testimony tainted by the witness' exercise of his constitutional rights with respect to questions concerning his conduct during or after the execution of the warrants is understandable but this Court cannot agree with the principle thus sought to be established, to wit, that unlawful conduct other than perjury of an individual, whether or not he be a police officer, if proven to have been committed subsequent to the execution of an affidavit, establishes perjury in the affidavit.

As counsel states, it is indeed a bizarre spectacle for a police afficer appearing in Court to be exercising his constitutional rights in response to questions concerning his activities while engaged in the performance of his

official duties. Such conduct, both with respect to the proceedings before the Knapp Commission and in this Court, lend support to the specter of police corruption requiring full airing of the facts in an effort to determine whether or not there was perjury in the affidavit admitted in support of the warrants.

Defendants produced three additional witnesses.

The first, Henry Schnitzer, an attorney of long standing, who had been a member of the police force and had worked in the Police Commissioner's Confidential Squad, conceded to be an expert in policy cases, testifying in substance that nobody places policy bets after the third race and that no special type envelopes are used in the policy business. (Minutes, pp.74-76.) Counsel's argument and conclusions are that no policy banker would take a bet after 2 P.M., as bearing upon Officer Bonino's testimony that he had observed envelopes being handed to defendant Sims after 2 P.M. on May 19, 1971 (p.66). The Court finds the testimony of this witness and the aforesaid argument not persuasive.

The remaining two witnesses were defendants Edith

Cameron and Juanita Sims. Mrs.Cameron testified on direct

examination that defendant Stanley Sims was the only person

who entered her home between 11:30 A.M. and 2:30 P.M. on

May 18, 1971 (Minutes, p. 78), that he remained until the

evening (p.79), that from the time he entered until the evening,

the rest of the defendants came in (pp.79-80). While still

on direct examination she testified as follows:

- "Q Now, directing your attention to the 19th, the following day, did you hear Patrolman Bonino testify that approximately five or six men came to your home during that period of time?
 - A Yes.
- Q And did anyone come to your home on the 19th?
- A Yes, they did.
- O Who came?
- A Mr. Williams and Mr. Davis.
- Q Did anyone ring the bell during that period of time other than those persons?
- A No.
- Q Who answers the door in your house?
- MR. LEARY: Objection.
- A I do.

THE COURT: Overruled. I will take it.

- Q And did Oscar Thomas stay at any time in your home on the 19th of May?
- A No."

The equivocal response to the second question was not further explored but in any event her testimony, unsupported by more credible evidence, cannot be accepted at face value in the light of her obvious interest in the outcome and her plea of guilty in this very case to criminal possession of gambling records, second degree.

Witness, Juanita Sims, also a defendant who pleaded guilty to the same crime, denied that any people knocked on her door on May 18, 1971 before 2:55 and 3:30 in the afternoon and that anybody came to her house on May 19th (p. 82). She

further testified on direct examination that her husband was "probably" home and that she usually answers the door hereself.

The Court was unimpressed with her testimony.

There remains now the weighing of the evidence produced by defendants to determine whether or not it was sufficient to cast doubt upon the truth of the affidavit submitted in support of the warrants. Though it is no doubt true that in the normal course of our everyday experience the automatic reaction to the assertions of the constitutional right of refusal to answer is the mental question: "I wonder what he had to hide?"--it does not simultaneously brand the witness as a perjuror or as a person who has committed any crime. Nevertheless, as the Appellate Division pointed out in that portion of its opinion previously quoted: "However tenuous the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired."

This Court cannot agree with defendants' basic argument, to the effect that a police officer having asserted his said constitutional rights with respect to conduct involved in the execution of the warrants, all of which were subsequent to the execution of the challenged affidavit thereby impugns the truth of the contents of the affidavit. Even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conclusion that the affidavit was perjurious would be without foundation. Carrying the assumption a step

further, the Court cannot assume or conclude that because a police officer asserts his constitutional rights to avoid a forced disclosure of his possible participation in criminal conduct that he was necessarily guilty of perjury in the execution of the said affidavit. The Court's previous comment with respect to the limits of the area in which the police officer witness availed himself of the privilege, and the fact that he testified freely with respect to his conduct prior to and in connection with the execution of the affidavit, are here pertinent.

The Court finds that the proof offered by the defendants falls far short of the standards prescribed in People v. Alfinito, supra, by which even a fair doubt arising from the testimony would have to be resolved in favor of the warrant. The Court holds that no doubt has been cast upon the truth of the contents of the affidavit submitted in support of the warrants. The defendants have failed to sustain the burden of proof. The findings of this Court are as set forth in the foregoing.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and the order entered thereon to the attorney for the defendants.

J. S. C.

trest to w.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel.
EDITH MAY CAMERON, et al.,

Petitioners- Appellants

-against
CHARLES FASTOFF, et al.,

Respondents-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)

COUNTY OF NEW YORK)

DOMENICK J. PORCO, being duly sworn, deposes and says:

- 1. That he is over the age of eighteen years, is not a party to the action and resides at 4190 East Tremont Avenue, Bronx, New York 10465.
- 2. That on the 8th day of July, 1975 he served two (2) copies of Appellants' Brief And Appendix in the above-entitled action upon Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Appellees, at Two World Trade Center, New York, New York, by enclosing same in a properly addressed, post paid wrapper and depositing same in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

DOMENICK

Sworn to before me this

8th day of July , 1975.

Conference Continued in No. Y. Court

ALBERT EHRLICH
Widtery Public, Stato of Hew York
No. 30-6158990 Qualified in Majoral
Cert. filed in N. J. County
Commission Expires March 39, 188